BADROL HISHAM MOHD SANI & ANOR v. DESTINATION MARINE SERVICES SDN BHD

COURT OF APPEAL, PUTRAJAYA
MD RAUS SHARIF PCA
MOHTARUDIN BAKI JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: J-04-319-10-2013]
5 FEBRUARY 2015

LEGAL PROFESSION: *Remuneration – Lien – Client's failure to settle solicitor's legal fees – Notice of solicitor's lien – Whether restraining order obtained before enforcing lien – Whether there was breach of lien – Whether solicitor's costs taxed – Whether there was collusion between parties to defeat solicitor's lien for costs – Whether notice of solicitor's lien valid*

The appellants were partners in a legal firm ('TZB') which acted for one Malaysian Bunkers Systems Sdn Bhd ('MBS') to recover monies which was due from the respondent ('DMS') to MBS. Using the services of TZB, MBS filed a suit against DMS in the Sessions Court and the High Court respectively. A consent order was then entered between MBS and DMS on 17 January 2005 and at this point, TZB was still acting for MBS. The terms of the consent order essentially provided that DMS would pay a sum of RM800,000 to MBS in full and final settlement by way of monthly instalments. Subsequently, there was a fallout between TZB and MBS where it was alleged that MBS failed to settle the legal fees due to TZB. On 26 August 2005, TZB issued a notice of solicitor's lien to the solicitors for DMS to notify DMS to desist from making any payments out on the sums due from DMS to MBS. Subsequently, TZB filed a petition to tax their fees on a solicitor client basis as per the bills raised for the legal services rendered. TZB's application *vide* encl. 6 was heard on 11 November 2005 and the High Court Judge only allowed a charge order on the judgment sums, including costs, to be recovered in the proceedings handled by TZB for MBS until settlement of the taxed fees payable to TZB. It was alleged that TZB had a lien in respect of their fees over all monies payable to MBS. The appellants filed several proceedings in relation to this matter, namely, by way of an application against DMS to tax their legal costs on a solicitor client basis and also to have such taxed amount to be paid by DMS. However, on 9 May 2006, *vide* suit MT4-12-109-2002, the learned High Court Judge dismissed the appellants' application and TZB's appeal to the Court of Appeal *vide* J-4-88-2006 was dismissed on 28 July 2008. Meanwhile, *vide* encl. 58(a), TZB intervened in a suit filed in the Court of Appeal between MBS and DMS in which TZB obtained an order for the taxed party to party costs in the said appeal to be paid to TZB. This order had been subsequently complied with by DMS. Dispute arose when DMS was alleged to have breached the notice of solicitor's lien and there was collusion by DMS with MBS to deprive TZB

of the taxed costs. As a result, an action was filed in the Sessions Court to recover the legal fees due and payable to the appellants. However, the appellants' claim was dismissed and the High Court affirmed the said decision. Hence, this appeal. It was alleged, *inter alia*, that (i) DMS breached the notice of lien dated 26 August 2005; (ii) DMS breached the charging order dated 11 November 2005; and (iii) DMS colluded with MBS to defeat TZB's lien for costs. Further, TZB referred to a Federal Court order dated 5 March 2010 which, it was contended, had rescinded the High Court order of 9 May 2006 (MT4-12-109-2002) and the Court of Appeal order of 28 July 2008 (J-4-88-2006).

Held (dismissing appeal with costs)
Per Varghese George JCA delivering the judgment of the court:

(1) No lien arose by a mere notice where the property to be received or preserved was to be applied towards costs of proceedings owed by MBS to their solicitors. On the facts, the contents and language of the notice of solicitor's lien showed that TZB was only seeking the co-operation of solicitors for DMS to notify DMS to desist from making any payments out on the sums due from DMS to MBS. Further, the party asserting a solicitor's common law lien in respect of property recovered or of property to be preserved was required to obtain an injunction restraining the client receiving or the paying party from making payment without notice to the solicitor. As such, in the absence of an enforceable lien, there could not have been any breach of lien by DMS. (paras 36-38)

(2) TZB knew that they had to obtain a restraining order, apart from a mere notice, against the client or against such party from whom monies were due to their client. The High Court had disallowed such a restraining order and TZB had wilfully suppressed this very material cause paper to conceal the fact that they had failed to obtain a restraining order from court against DMS which had to go along with a notice of solicitor's lien if it was to be valid at all as a lien. (para 40)

(3) TZB's application *vide* encl. 6 was heard on 11 November 2005 and the learned judge only allowed a charge order on the judgment sums to be recovered, *ie*, in proceedings handled by TZB for MBS, until settlement of the taxed costs of TZB. At that point in time, TZB's costs on solicitor client basis had yet to be taxed where the bills of costs were only issued on 20 April 2005 to MBS. Further, the court did not grant any restraining order as against MBS or DMS from receiving or effecting any further payments respectively, arising from the proceedings in which TZB had acted for MBS. In any event, any sums due from DMS to MBS under the relevant proceedings between them had been released to MBS before 11 November 2005. As such, DMS had not committed a breach of the charging order. (paras 41-43)

(4) There was no collusion on the part of MBS and DMS as the alleged compromise evidenced by the consent order dated 17 January 2005 recorded between MBS and DMS was prior in time to the notice of solicitor's lien relied upon by TZB and in any case, it was when TZB was still acting for MBS. Further, during the trial before the Sessions Court, TZB had not adduced any evidence through relevant witnesses or documents to substantiate their allegation of such a "collusion" being in existence to defeat TZB's right to recover their costs owed by MBS. (paras 48 & 50)

(5) The Federal Court order dated 5 March 2010 was made in respect of a notice of motion filed by MBS, to obtain leave to appeal from the decision of the Court of Appeal which was in relation to encl. 58(a). The leave sought by MBS which was not granted by the Federal Court was in the context of proceedings of a different nature. There was no relevance between the Federal Court order dated 5 March 2010 to the issues at hand or how it had rescinded the High Court order of 9 May 2006 and/or the subsequent dismissal on 28 July 2008 by the Court of Appeal as to the appeal brought by TZB against that High Court order. (paras 51 & 52)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu merupakan rakan kongsi di sebuah firma guaman ('TZB') yang telah mewakili Malaysian Bunkers Systems Sdn Bhd ('MBS') untuk menuntut wang yang masih belum dibayar oleh responden ('DMS') kepada MBS. Dengan menggunakan perkhidmatan TZB, MBS telah memfailkan tindakan terhadap DMS masing-masing di Mahkamah Sesyen dan di Mahkamah Tinggi . Satu perintah persetujuan telah dimasuki antara MBS dan DMS pada 17 Januari 2005 dan pada masa itu, TZB masih bertindak bagi pihak MBS. Terma-terma perintah persetujuan menyatakan bahawa DMS akan membayar jumlah sebanyak RM800,000 kepada MBS sebagai penyelesaian muktamad melalui ansuran bulanan. Selepas itu, satu pertikaian telah berlaku antara TZB dan MBS di mana MBS telah gagal menyelesaikan yuran guaman yang masih tertunggak kepada TZB. Pada 26 Ogos 2005, TZB telah mengeluarkan satu notis lien peguamcara kepada peguamcara DMS untuk memaklumkan DMS supaya berhenti membuat sebarang bayaran daripada jumlah yang masih belum dibayar oleh DMS kepada MBS. TZB telah, selepas itu, memfailkan satu petisyen untuk mentaksir yurannya atas dasar peguamcara dan anak guam bagi bil-bil yang dikeluarkan untuk perkhidmatan guaman yang diberikan. Permohonan TZB melalui lampiran 6 telah didengar pada 11 November 2005 dan Hakim Mahkamah Tinggi telah membenarkan satu perintah bayaran atas jumlah penghakiman, termasuk kos, berkaitan dengan prosiding yang dikendalikan oleh TZB untuk MBS sehingga penyelesaian taksiran yuran yang perlu dibayar kepada TZB. Adalah dihujahkan bahawa TZB mempunyai lien terhadap yuran mereka atas jumlah yang perlu dibayar kepada MBS. Perayu-perayu telah memfailkan

beberapa prosiding berkaitan dengan perkara ini, iaitu, melalui permohonan terhadap DMS untuk mentaksir kos guaman mereka atas dasar peguamcara dan anak guam dan juga untuk mentaksir jumlah yang perlu dibayar oleh DMS. Walau bagaimanapun, pada 9 Mei 2006, melalui guaman MT4-12-109-2002, Yang Arif Hakim Mahkamah Tinggi telah menolak permohonan perayu-perayu tersebut dan rayuan TZB ke Mahkamah Rayuan melalui J-4-88-2006 ditolak pada 28 Julai 2008. Di samping itu, melalui lampiran 58(a), TZB telah mencelah dalam guaman yang difailkan di Mahkamah Rayuan antara MBS dan DMS di mana TZB telah memperolehi satu perintah supaya kos pihak ke pihak yang telah ditaksir dibayar kepada TZB. Perintah ini dipatuhi oleh DMS. Pertikaian berbangkit apabila DMS dikatakan telah memungkiri notis lien peguamcara dan terdapat pakatan sulit antara DMS dengan MBS untuk menafikan TZB daripada kos yang ditaksir. Satu tindakan, dengan itu, telah difailkan di Mahkamah Sesyen untuk menuntut yuran guaman yang masih belum dibayar kepada perayu-perayu. Walau bagaimanapun, tuntutan perayu-perayu ditolak dan Mahkamah Tinggi telah mengesahkan keputusan tersebut. Oleh itu, rayuan ini. Adalah dihujahkan, antara lain, bahawa (i) DMS telah memungkiri notis lien bertarikh 26 Ogos 2005; (ii) DMS telah memungkiri perintah bayaran bertarikh 11 November 2005; dan (iii) DMS telah berpakat secara sulit dengan MBS untuk menafikan lien TZB untuk kos. Tambahan, TZB telah merujuk kepada satu perintah Mahkamah Persekutuan bertarikh 5 Mac 2010, di mana adalah dihujahkan bahawa perintah tersebut telah membatalkan perintah Mahkamah Tinggi bertarikh 9 Mei 2006 (MT4-12-109-2002) dan perintah Mahkamah Rayuan bertarikh 28 Julai 2008 (J-4-88-2006).

Diputuskan (menolak rayuan dengan kos)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Lien tidak berbangkit semata-mata melalui notis di mana harta yang akan diterima atau dikekalkan adalah terpakai kepada kos prosiding yang perlu dibayar oleh MBS kepada peguamcaranya. Berdasarkan fakta, kandungan dan bahasa dalam notis lien peguamcara menunjukkan bahawa TZB hanya meminta kerjasama peguamcara DMS untuk memaklumkan DMS supaya berhenti membuat sebarang bayaran daripada jumlah yang perlu dibayar oleh DMS kepada MBS. Tambahan, pihak yang menegaskan lien peguamcara berkenaan harta yang diterima atau harta untuk dikekalkan dikehendaki memperolehi satu injunksi untuk menghalang anak guamnya daripada menerima atau pihak yang membayar daripada membuat bayaran tanpa notis kepada peguamcara. Oleh itu, tanpa lien yang boleh dikuatkuasakan, tidak wujud lien yang boleh diingkari oleh DMS.

(2) TZB mengetahui bahawa mereka perlu mendapatkan perintah halangan, selain daripada notis, terhadap anak guam atau terhadap pihak tertentu di mana wang masih belum dibayar kepada anak guamnya. Mahkamah Tinggi telah menolak perintah halangan tersebut dan TZB tidak

mendedahkan kertas kausa penting ini secara sengaja untuk menyembunyikan fakta bahawa mereka telah gagal untuk memperolehi satu perintah halangan daripada mahkamah terhadap DMS yang sepatutnya dilampirkan bersama-sama dengan notis lien peguamcara untuk menjadikannya sebagai lien yang sah.

(3) Permohonan TZB melalui lampiran 6 dibicarakan pada 11 November 2005 dan Yang Arif Hakim hanya membenarkan perintah bayaran terhadap jumlah penghakiman yang perlu dibayar, iaitu, bagi prosiding-prosiding yang dikendalikan oleh TZB untuk MBS, sehingga penyelesaian kos untuk ditaksir bagi TZB. Pada masa itu, kos TZB atas dasar peguamcara dan anak guam masih belum ditaksir di mana bil kos hanya dikeluarkan pada 20 April 2005 kepada MBS. Tambahan lagi, mahkamah tidak membenarkan sebarang perintah halangan terhadap MBS atau DMS dari menerima atau membuat bayaran masing-masing, yang berbangkit daripada prosiding-prosiding di mana TZB telah bertindak untuk MBS. Dalam apa jua keadaan, sebarang bayaran yang perlu dibayar daripada DMS kepada MBS di bawah prosiding-prosiding berkaitan antara mereka telah pun dibayar kepada MBS sebelum 11 November 2005. Oleh itu, DMS tidak memungkiri perintah bayaran tersebut.

(4) Tidak terdapat pakatan sulit di antara MBS dan DMS memandangkan kompromi yang dikatakan itu dibuktikan melalui perintah persetujuan bertarikh 17 Januari 2005 yang direkodkan di antara MBS dan DMS adalah sebelum notis lien peguamcara yang disandarkan oleh TZB dan dalam apa jua keadaan, ia berlaku apabila TZB masih bertindak bagi pihak MBS. Tambahan lagi, semasa perbicaraan di Mahkamah Sesyen, TZB tidak mengemukakan sebarang keterangan melalui saksi-saksi berkenaan atau dokumen-dokumen untuk menyokong dakwaan mereka berkenaan kewujudan pakatan sulit sebegitu untuk menafikan hak TZB dari menerima kos mereka yang masih belum dibayar oleh MBS.

(5) Perintah Mahkamah Persekutuan bertarikh 5 Mac 2010 dibuat berdasarkan notis usul yang difailkan oleh MBS, untuk memperolehi kebenaran merayu terhadap keputusan Mahkamah Rayuan yang berkaitan dengan lampiran 58(a). Kebenaran yang dituntut oleh MBS yang tidak dibenarkan oleh Mahkamah Persekutuan adalah berdasarkan konteks prosiding yang berlainan. Tidak terdapat kaitan di antara perintah Mahkamah Persekutuan bertarikh 5 Mac 2010 dan isu di sini atau bagaimana ia telah membatalkan perintah Mahkamah Tinggi bertarikh 9 Mei 2006 dan/atau penolakan seterusnya pada 28 Julai 2008 oleh Mahkamah Rayuan berkenaan rayuan yang difailkan oleh TZB terhadap perintah Mahkamah Tinggi.

Case(s) referred to:
Price v. Crouch (1891) 60 LJQB 767 ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 123

For the appellant - Badrol Hisham Md Sani; M/s Zainal & Badrol
For the respondent - C Kumaresan; M/s Pereira & Shan

[Appeal from High Court, Johor Bahru; Civil Appeal No: 12B-168-10-2012]

Reported by Kumitha Abd Majid

JUDGMENT

Varghese George JCA:

Introduction

[1] The appellants had at Johor Bahru Sessions Court *vide* Saman No. 52-4230-2011 brought an action to recover from the respondent a sum of RM95,338 (described as 'kos guaman') together with interest and costs. After a full trial, the learned Sessions Judge had on 28 September 2012 dismissed the appellants' claim.

[2] An appeal was lodged against that decision by the appellants. On 13 May 2013 the learned Judicial Commissioner of the High Court in Civil Appeal No. 12B-168-10-2012 dismissed the appeal and affirmed the decision of the Sessions Court.

[3] This appeal now before us (pursuant to leave granted on 1 October 2013) was against the dismissal of the appellants' claim by both the Sessions Court and the High Court.

Background

[4] The appellants are partners in the legal firm of Tetuan Zainal and Badrol ('TZB'). TZB had acted for one Malaysian Bunkers Systems Sdn Bhd ('MBS') in certain court proceedings.

[5] MBS using the services of TZB had brought two suits, one at the Sessions Court and the other at the High Court, to recover monies due to MBS from one Destination Marine Services Sdn Bhd (the respondent in this appeal) ('DMS').

[6] MBS's Sessions Court action was Summons No. 22-67-1993 ('MBS v. DMS'). This claim was dismissed by the Sessions Court. On appeal by MBS, the High Court *vide* JB High Court No. MT4-12-109-2002 dismissed the appeal and affirmed the Sessions Court's dismissal of MBS's claim.

[7] MBS's High Court Suit was Guaman Sivil No. 22-68-1993 ('MBS v. DMS'). MBS's claim was dismissed by the High Court. However on appeal by MBS, the Court of Appeal (in Civil Appeal No. J-02-1052-2001) on 28 April 2004 reversed the High Court's decision.

DMS pursued the matter further and filed an application for leave to the Federal Court (Federal Court Notice of Motion No. 08-59-2004). At the hearing of the leave application on 17 January 2005 a consent order was entered between MBS and DMS. At this point TZB was still acting for MBS. The terms of the consent order essentially provided that DMS would pay MBS in full and final settlement a sum of RM800,000 by way of monthly instalments (backed by post dated cheques, the last of which instalment was to be on 20 September 2005).

[8] Subsequently there was a fallout between TZB and their client MBS. TZB alleged that they had only been paid a sum of RM10,000 as legal fees as against six bills raised by TZB for services rendered, all of which bills were dated 20 April 2005. On 26 August 2005 TZB issued to solicitors for DMS a letter bearing the heading 'Notice of Solicitor's Lien'.

[9] TZB then went on to file a petition to tax on a solicitor-client basis their fees as per the bills raised for the legal services rendered. This was the JB High Court Petition No. 26-08-2005(4) which cited MBS as the respondent.

On 11 November 2005, Azahar bin Mohamed J (as His Lordship then was) allowed two orders, namely:

(a) an order to tax the costs related to the matters handled by TZB for MBS; and

(b) an order, 'charging' (as it is stated) all monies receivable from DMS until settlement of such taxed fees payable to TZB.

[10] TZB served a draft copy of the order of court of 11 November 2005 on the same day on solicitors for DMS and demanded that DMS should stop all further instalment payments to MBS as, allegedly, TZB had now a 'lien' in respect of their fees over all monies payable to MBS.

(As it would emerge later in this judgment, TZB's related summons-in-chamber (encl. 6) application dated 29 August 2005 had applied for three (3) orders but the High Court had only granted two (2) of them. Further, as it would also emerge later, the High Court on 11 November 2005 did not restrain DMS by nature of an injunctive order from further paying or releasing monies to MBS).

[11] At this stage, for clarity, it may be summarised that TZB was involved in the proceeding for their client and subsequently against their erstwhile client, MBS, under three clusters. They were:

(a) Proceedings emanating from JB Sessions Court Summons No. 22-67-1993, leading to the appeal in the JB High Court, MT4-12-109-2002 and resting there without any further appeal; the parties being MBS and DMS.

A (b) Proceedings emanating from JB High Court Suit No. 22-68-1993, leading to the appeal by MBS to the Court of Appeal No. J-02-1052-2001 and the subsequent application for leave by DMS before the Federal Court *vide* the Notice of Motion No. 08-59-2004 where the consent order of 17 January 2005 between DMS and MBS was entered.

B (c) JB High Court Petition No. 26-08-2005(4) – commenced by TZB against MBS (their client) in respect of their fees.

[12] TZB then within JB High Court MT4-12-109-2002 (within the first cluster) by way of an application (encl. 24) naming DMS as defendant/ respondent, sought to tax their legal costs on a solicitor-client basis and also C to have such taxed amount to be paid by DMS. On 9 May 2006, once again Azahar bin Mohamed J (as His Lordship then was) dealt with this application and dismissed the same, noting as follows:

(a) that TZB had to issue their bill of costs to their client MBS to be taxed D and no leave of court was required for this;

(b) there was no 'nexus' between TZB and DMS to require DMS to pay TZB for legal services rendered by TZB to MBS, their client; and

(c) on affidavit evidence, the court could not conclude that there was any collusion, as alleged by TZB, between MBS and DMS to deprive TZB E of their legal costs.

[13] TZB appealed against the aforesaid decision of the 9 May 2006 *vide* Court of Appeal Civil Appeal No. J-4-88-2006. This appeal was dismissed by the Court of Appeal on 28 July 2008.

F **[14]** Meanwhile, in Court of Appeal Civil Appeal No. J-02-1052-2001 *vide* encl. 58(a), (within the second cluster) TZB intervened in that appeal ('MBS v. DMS') and obtained an order on 18 May 2006 (by a majority decision) for the taxed 'party to party' costs in the appeal (payable by DMS) be paid to TZB (towards part settlement of taxed legal costs due to TZB from MBS).

G There was no dispute that this order had been subsequently complied with by DMS.

[15] Further in Court of Appeal Civil Appeal No. J-02-1052-2001 TZB had also (on 9 May 2006) filed an application *vide* encl. 65(a) for orders against DMS in similar terms and on similar grounds as formed the subject H matter of the Sessions Court Summons No. 52-4230-2011, the action from which this appeal originated.

Enclosure 65(a) was however subsequently withdrawn by TZB and was accordingly struck out by the Court of Appeal on 6 January 2012.

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Sessions Court Summons No: 52-4230-2011

[16] The substance of TZB's claim against DMS, as could be discerned from the pernyataan tuntutan filed, was found encapsulated at para. 47 thereof and it was as follows:

> 47. Melalui notis tuntutan bertarikh 27/06/2011, firma guaman Plaintif-plaintif telah menuntut terhadap Defendan jumlah sebanyak RM95,338.00 di atas alasan bahawa Defendan telah melanggari notis untuk lien bertarikh 11/11/2005, Perintah mencaj bertarikh 11/11/2005 dan secara niat jahat berpakat ("collude") dengan MBS untuk menafikan hak Plaintif-plaintif terhadap kos tetap Defendan telah gagal enggan atau dengan sengaja tidak mahu menjelaskan jumlah tersebut atau apa-apa jumlah sekalipun.
>
> Butir-butir
>
> | | |
> |---|---|
> | (a) Kos yang dicukai ("taxed costs") melibatkan kes Mahkamah Tinggi Johor Bahru Guaman Sivil No. 22-68-1993 | RM105,338.00 |
> | (b) Tolak sebahagian bayaran oleh MBS | RM 10,000.00 |
> | Baki | RM 95,338.00 |

[17] TZB's allegation was that this was a breach committed by DMS on an alleged lien of which notice had been given, and further that there was a collusion by DMS with MBS to deprive TZB of the taxed costs in High Court Guaman Sivil No. 22-68-1993.

Learned Sessions Judge

[18] The learned Sessions Judge held that all the issues raised by TZB had been conclusively determined against the TZB by the decision of Azahar bin Mohamed J at the High Court on 9 August 2006 in Civil Appeal No. MT4-12-109-2002, as affirmed by the Court of Appeal on 28 July 2008 in Civil Appeal No. J-04-88-2006. The relevant part of the grounds of the Azahar J was quoted by the learned Sessions Judge and it was as follows:

> Regarding the second prayer, the applicant has no nexus with the defendant. The applicant was the former solicitors for the plaintiff. If the applicant has any cause of action for his costs, it is against the plaintiff and not the defendant. The cost agreed to and payable between the plaintiff and the defendant is a matter for them and not the applicant. I do not think it is right for the applicant to demand costs payable by the defendant to be paid direct to him as his cost since he is no longer acting for the plaintiff. Based on the affidavit evidence, I am unable to conclude that the plaintiff and the defendant have colluded to deprive the applicant of his legal costs.

[19] The learned Sessions Judge also noted that the issue of a 'lien' allegedly binding on DMS was also raised in encl. 24 (filed subsequently) in MT4-12-109-2002 and had been dismissed both by the High Court and the Court of Appeal (Civil Appeal No. J-4-88-2006).

[20] The learned Sessions Judge further held that no evidence had been adduced by TZB to prove that there had been any collusion as between MBS and DMS to deny TZB their taxed legal fees. TZB had also failed to call any witnesses from MBS to further advance this contention of an apparent collusion.

[21] More tellingly, the learned Sessions Judge held that TZB had attempted to conceal, namely, by not producing when requested to and only making it available at trial, (upon cross-examination) the copy of the petition and related affidavits (in High Court Petition No. 26-08-2005). It was obvious from the relief sought, although TZB had applied for a restraining order to be made against DMS from releasing any further monies due to MBS, the High Court had not granted any specific order on 11 November 2005 to that extent as applied for.

TZB was also found to have failed to forward the complete set of cause papers with their letter of 11 November 2005 to DMS's solicitors and this it was held was deliberately done in order to suppress the fact that no such injunctive order had been granted by the court despite it being applied for; this, the learned Sessions Judge held went to the basis or credibility of TZB's claim itself.

[22] In the light of the several similar applications brought by TZB to impose liability on DMS, all of which had been dismissed against TZB, the learned Sessions Judge was of the further view that TZB's action was an abuse of the process of court.

At The High Court

[23] The learned High Court Judge was of the view that the learned Sessions Judge had not erred in dismissing TZB's claim. While endorsing all the reasons given by the learned Sessions Judge, the High Court went on to further emphasise and rely on the doctrine of '*res judicata*' and held that it applied in this case.

[24] Accordingly, it was held that TZB was estopped from bringing this action against DMS as all the issues pertaining to the TZB's allegations that DMS had not adhered to the notice of lien and that there was 'collusion' between DMS and MBS had all been raised and dealt with in Court of Appeal Civil Appeal No. J-04-88-2006. Those contentions of TZB had been rejected. The appeal was therefore dismissed by the High Court.

Our Observations And Decision

[25] TZB argued before us that TZB's causes of action were three-fold, namely:

(a) DMS breached the notice of lien dated 26 August 2005;

(b) DMS breached the charging order dated 11 November 2005; and

(c) DMS colluded with MBS to defeat TZB's lien for costs.

It was contended that each of the aforesaid grounds/causes of action was separate and independent and TZB need only prove any one of them to succeed in their claim against DMS.

[26] TZB also referred to a 'Federal Court Order dated 5 March 2010' which, it was contended, had 'rescinded' the High Court Order of 9 May 2006 (MT4-12-109-2002) and the Court of Appeal Order of 28 July 2008 (J-4-88-2006). It was argued that this order had not been considered by the learned Sessions Judge.

Law On Solicitor's Lien

[27] The starting point will be to first appreciate the particular nature of the solicitor's lien that TZB asserts that they stand possessed of in this matter. In the leading tome, *Cordery on Solicitors*, (7th edn.), the authors state:

> Those common law rights of a solicitor which are often called his 'liens' are two in number: a '**retaining lien**', i.e., **a right to retain property already in his possession until he has been paid costs due to him** in his professional character; and a '**lien on property recovered or preserved**', i.e., *a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery*. This latter right is extended by the Solicitors Act 1974, s. 73 which confers upon the court the power to make charging orders over real and personal property recovered or preserved in proceedings through the work of the solicitors.
>
> (emphasis added)

[28] With respect to retaining liens, the authors further comment as follows:

> The retaining lien is founded on the general law of lien which springs from possession, and is in general governed by the same rules as other cases of possessory lien.

The commentary goes on further to state:

> The lien attaches on all deeds, papers, or other personal property which come into the solicitor's possession in the course of his professional employment with the sanction of the client and are the client's property, such as a bill of exchange, applications for shares, share certificates, a debenture trust deed, a policy of assurance, letters of administration or money. Money being divisible, the lien only attaches on the amount actually due, and no lien attaches to a client's will, a deed made in favour of the solicitor reserving a life interest and power of revocation to the client, or original records of the court.

[29] With respect to lien on property recovered or preserved, (also referred as 'particular' lien) it is noted in the same works that:

> A solicitor has at common law a 'lien' over property recovered or preserved of the proceeds of any judgment obtained by his works on his client's behalf for the costs incurred thereby which have been authorised by his retainer.

A ...

This common law lien is in fact not a mere lien but a claim to the equitable interference of the court to have the judgment held as security for costs.

...

B The lien is a 'particular lien' in that it is not available for any costs other than the costs properly incurred of recovering and preserving the property in questions, so that the lien upon a fund recovered in a suit is confined to the costs of those particular proceedings, or those immediately connected therewith.

C **[30]** In similar vein the author of *The Law of Advocates and Solicitors in Singapore and West Malaysia* (2nd edn.), Tan Yock Lin, states that:

There are two kinds of lien: a retaining lien and a common law lien. The **retaining lien** arises by way of an implied agreement between the solicitor and his client and is a right of a solicitor, recognized by common law, to retain all his client's documents, deeds and other personal property in his
D possession until payment of all costs owing him has been made. It is similar in nature to such other liens as the banker's lien and broker's lien. **The common law lien is rather more limited, being a lien on the fruits of the judgment** where a successful judgment has been obtained by the solicitor on behalf of his client. **On top of both** the retaining and the
E common law lien, the intervention of statute has created what may be called **a statutory lien** which takes the form of a charging order on property successfully recovered by a solicitor for his client.

(emphasis added)

The author goes on to further note:

F The common law lien is a lien on a judgment successfully obtained for the client. **The term 'lien' is one of convenience**, not a correct expression, and is employed out of regard to the retaining lien. The nomenclature is a little misleading 'because the so-called lien may extend to things not in the possession of the solicitor. *The solicitor's common law right in respect of a*
G *judgment is more accurately expressed as a claim to the equitable interference of the court* to have the judgment held as a security for the solicitor's debt'. Its rationale is well-stated by Lord Kenyon in *Read v. Dupper* as follows: "the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry and, in many cases, at whose expense these fruits are obtained".

H (emphasis added)

[31] With respect to the 'charging order' that a solicitor could obtain from the courts to prevent the fruits of his exertions being disposed of to his prejudice while his costs remain unsatisfied, Tan Yock Lin in his guiding
I works also goes on to state:

The decision in *Shaw v. Neale* that no lien could attach to real property recovered or preserved by a solicitor's exertions prompted the English legislature to enact section 28 of the Solicitors Act 1860 conferring power

on the court to declare that a solicitor is entitled to a charge upon property recovered or preserved by his exertions. Section 28 is the precursor of the equivalent provisions existing here.

The statutory provision referred to in the Malaysian context is s. 123 of the Legal Profession Act, 1976 ('LPA').

[32] Section 123 of the LPA was in the following terms:

123. Advocate and Solicitor entitled to charge on property for costs

Any court in which an advocate and solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the advocate and solicitor entitled to a charge on the property recovered or preserved in such suit, matter or proceeding for such advocate and solicitor's taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the costs and for raising money to pay, or for paying, the costs out of the property as it thinks fair and reasonable, and all conveyance and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser for value without notice, be void as against the advocate and solicitor:

Provided that no order shall be made if the right to recover the costs is barred by the Limitation Act 1953.

With respect to the meaning to be accorded to the words "the property recovered or preserved in such suit" in that provision, the author of *The Law of Advocates and Solicitors in Singapore and West Malaysia*, further comments (citing supporting authorities):

There was also authority that a liquidated sum due under an unsatisfied judgment is property as well as unliquidated damages which have yet to be assessed. The court held that there was no material distinction between a judgment for a liquidated sum, a judgment for damages to be assessed, an order for costs where taxation had taken place and one where it had not.

[33] From the factual context surrounding this case, there was no doubt that the appellant was not here asserting a claim under a 'retaining lien' (general possessory lien) but under the second category of 'lien' under the common law on 'property' recovered and in the hands of a third party (here DMS) but payable to their client. It is noteworthy that the commentary in '*Cordery On Solicitors*' on the enforcement of such a common law lien had this to say:

Owing to the nature of the common law lien on property recovered or preserved *the solicitor may apply to the court for its enforcement where there is a probability that the client will attempt to deprive him of his costs. Upon such application the court may grant an injunction restraining the client from receiving, or the paying party from making, payment without notice to the solicitor, or order*

A *payment of costs out of a fund in court to which the client is entitled or declare the applicant entitled to a charge on the property*. The lien may be enforced notwithstanding that recovery of the debt is statute-barred, but the court will not interfere before the costs secured are ascertained by agreement or taxation, at least not to the prejudice of the client.

B (emphasis added)

Whether DMS Breached The 'Notice Of Solicitor's Lien' Dated 26 August 2005

[34] The key parts of the 'Notice of Solicitor's Lien' of 26 August 2005 are reproduced below:

C 5. We have now commenced a petition for costs against the said company in the High Court in Johor Bahru Petition No: MT4-26-8-2005 for not having settle our costs for services rendered with respect to the above matters. The petition is now fixed for hearing before the learned judge of the High Court on 22/09/2005.

D 6. As solicitors for the said company, we have a lien on the proceed of the judgment and costs obtained by our work and instrumentality on the company's behalf.

7. We are now giving you notice as co-solicitors of our lien and urge you to cooperate in protecting our lien. We draw your attention to the 4 matter above and hereby notify you that any compromise or E settlement with respect must be brought to our attention immediately and sanction by the court with the objective of not denying or defeating our lien.

8. Kindly notify your client, being the party liable to pay under the terms of the judgment or any future judgment, of our lien F immediately, and to recall or cancel all post-dated cheques made payable to the said company in settlement of the judgment sum and taxed costs as above mentioned.

9. Kindly advise your client that if they chose to continue paying the said company without regard to our lien or claim for legal fees and G disbursement after being notify hereof, your client will again be liable to pay to us.

[35] Subsequent to the aforesaid letter, TZB on 29 August 2005 filed encl. 6 in JB High Court *vide* Petition No. 26-8-Tahun 2005 (4) wherein one of the prayers sought was:

H 3. Responden samada dengan sendiri atau melalui agen, wakil atau pekerjanya dicegah atau dihalang melalui perintah Mahkamah Yang Mulia ini daripada menuntut atau menerima apa-apa bayaran yang dinyatakan di dalam jadual 2 di sini selagi kos-kos pempetisyen belum diselesaikan dengan sepenuhnya.

I (Enclosure 6 was only heard on 11 November 2005 and as discussed later in this judgment this order sought by TZB against DMS was not granted by the court).

[36] Clearly by the contents and language of the said 'Notice of Solicitor's Lien' dated 26 August 2005, TZB was only seeking the co-operation of solicitors for DMS to notify DMS to desist from making any payments out on the sums due from DMS to MBS.

[37] It is our view that in law there did not come into existence any enforceable 'lien' by virtue of the said notice of 26 August 2005.

As pointed out above, the party asserting a solicitor's common law lien in respect of property recovered or of property to be preserved was required to obtain an injunction restraining the client receiving or the paying party from making payment without notice to the solicitor.

No 'lien' arose by a mere notice (as was the case here) where the property to be received or preserved was to be applied towards costs of proceedings owed by MBS to their solicitors, TZB. The solicitors concerned had to obtain a restraining order either against their client (from receiving) or against the party obliged to pay the client (for paying) any of the monies recovered by way of the proceedings in question.

[38] Our answer to the first issue was that in the absence of an enforceable lien on 26 August 2005, there could not have been any 'breach of lien' by DMS, as alleged by TZB.

[39] It was pertinent to point out here too that encl. 6 and the related supporting affidavit was firstly not forwarded with the said notice dated 26 August 2005 to solicitors for DMS. More significantly TZB had withheld forwarding the said relevant cause papers to the solicitors for DMS despite various attempts at discovery of the said documents during the Sessions Court proceedings. As observed by the learned Sessions Judge, the cause papers were only reluctantly disclosed during the course of the trial at the Sessions Court.

[40] It was obvious that TZB well knew that in law that they had to obtain a restraining order (apart from a mere notice) against the client or against such party from whom monies were due to their client, to have an effective or enforceable 'lien' under this second category of lien. The High Court on 11 November 2005 had disallowed such a restraining order. The Sessions Court was therefore correct in our assessment (in the trial of this immediate suit) to hold in the circumstances, that TZB had wilfully suppressed this very material cause paper to conceal the fact that they had failed to obtain from the court such a restraining order against DMS which had to go along with a notice of solicitors lien if it was to be valid at all as a 'lien'.

Whether DMS Has Breached The Charging Order Dated 11 November 2005

[41] As pointed out earlier (TZB's application *vide* encl. 6) was heard on 11 November 2005 and Azahar bin Mohamed J (as His Lordship then was) only allowed a 'charge-order' on the judgment sums (including costs) to be recovered, that is, in the proceedings handled by TZB for MBS, until settlement of the 'taxed costs' of TZB.

Firstly, at that point in time TZB's costs on solicitor-client basis (as between TZB and MBS) had yet to be taxed (the bills of costs were only issued on 20 April 2005 to MBS). Secondly, it behoves repetition here that the court did not grant any restraining order as against MBS or DMS from receiving or effecting any further payments respectively, arising from the proceedings in which TZB had acted for MBS.

[42] It was not disputed that whatever sums due from DMS to MBS under the relevant proceedings between them had all been released to MBS before 11 November 2005, in any event.

[43] In the circumstances, we were not persuaded that there had occurred a breach by DMS of the 'charging order' made by the court on 11 November 2005.

Whether DMS Colluded With MBS To Defeat TZB's Lien For Costs

[44] To recap, the learned Sessions Judge held that there was no evidence adduced by TZB to establish as a matter of fact that there had been collusion on the part of MBS and DMS to defeat TZB's supposed 'lien' for costs, in any event.

The learned Judge at the High Court hearing the appeal from that decision affirmed that finding, whilst also stating that the issue of 'collusion' raised by TZB had been in any case conclusively ruled against TZB by the High Court (per Azahar Mohamed J) on 9 May 2006 in JB High Court *vide* Suit No. MT4-12-109-2002. This decision of Azahar J had also been affirmed when TZB's appeal to the Court of Appeal *vide* Civil Appeal No. J-4-88-2006 was dismissed on 28 July 2008. The learned judge of the High Court in this matter was of the view that the doctrine of '*res judicata*' accordingly applied in this situation to preclude TZB from pursuing with this issue.

[45] It was TZB's contention however that the grounds of the majority decision of the Court of Appeal in Civil Appeal No. J-02-1052-2001 per Abdul Aziz Mohamed JCA (as His Lordship then was) had observed that there was 'evidence of collusion' between MBS and DMS.

We have read the said grounds in detail and are to point out that the observation in question was made in the context of encl. 58(a) in that appeal proceedings (emanating as it was from JB High Court Civil Action No. 22-68-1993) where at the leave stage before the Federal Court the consent order of 17 January 2005 was entered into between MBS and DMS, as earlier noted.

[46] Firstly, encl. 58(a), it must be appreciated, was an application by TZB brought subsequently to obtain an order that the 'party to party' costs ordered at the Court of Appeal should be paid out to TZB directly to account of their costs recoverable from MBS. This was allowed by the majority of the learned panel hearing that application.

[47] Secondly, it must also be stated, with respect, that Abdul Aziz Mohamed JCA (as His Lordship then was) appeared to have relied, supposedly on the situation that there was a 'notice of lien' before the 'compromise' was reached between MBS and DMS without the knowledge or excluding TZB.

This, it must be pointed out was not borne out by the facts surrounding this matter. The consent order was entered on 17 January 2005 when TZB was still on record for MBS. Further, the 'Notice of Solicitors Lien' was in any case only issued on 26 August 2005 and this could not have given rise even to a '*prima facie*' inference of 'collusion' as the judgment adverted to.

[48] Counsel for TZB placed much reliance also on the case of *Price v. Crouch* (1891) 60 LJ QB 767, in arguing that as in the case at hand before us, the court there had recognised that – (1) a notice of lien and (2) collusion was sufficient to create an enforceable 'lien'.

We have also given this case our due consideration. We note that on appeal in that case (as pointed out by Abdul Aziz Mohamed JCA) it was held that a mere notice issued was not sufficient to create a 'lien'. The issue of whether there was or not 'collusion' was always a question of fact for the determination of the court.

In the instant case, as already pointed out above, that there could not have arisen any 'collusion' at all as the alleged 'compromise' evidenced by the consent order of 17 January 2005 recorded between MBS and DMS, was prior in time to the 'Notice of Solicitor's Lien' (26 August 2005) relied upon by TZB and in any case was when TZB was still acting for MBS.

[49] Azahar Mohamed J (as His Lordship then was) had in our view, specifically dealt with this issue when TZB's application *vide* encl. 24 in JB High Court MT4-12-109-2002 was heard and disposed on 9 May 2006. It was held that on affidavit evidence before the court it could not be concluded that there was any collusion, as alleged by TZB, between MBS and DMS to deprive TZB of their legal costs.

TZB's appeal against this decision, as referred to earlier *vide* Court of Appeal Civil Appeal No. J-4-88-2006 was also dismissed by the Court of Appeal on 28 July 2008.

[50] It is pertinent to point out that at the trial before the Sessions Court, as observed by the learned Sessions Judge, TZB had not adduced any evidence through relevant witnesses or documents to substantiate or establish their allegation of such a 'collusion' being in existence to defeat TZB's right to recover their costs owed by MBS.

Federal Court Order Of 5 March 2010

[51] TZB made reference to the aforesaid order rather casually and argued that this Federal Court order had the effect of 'rescinding' the High Court order of 9 May 2006 of Azahar J (in MT4-12-109-2002) and the Court of Appeal Order of 28 July 2008 (in J-4-88-2006, where TZB's appeal against the High Court decision of 9 May 2006 was dismissed). We have examined the Federal Court order of 5 March 2010 in Civil Application No. 08-63-2006(J) and note that the order made was in respect of a notice of motion filed by MBS, as it would appear, to obtain leave to appeal, arising from the decision (by majority) of the Court of Appeal in Civil Appeal No. J-02-1052-2001 of 18 May 2006 (related to encl. 58(a) of TZB therein to be directly paid the taxed 'party-party costs' in that appeal). The leave sought by MBS, which was not granted by the Federal Court, it must be stressed, was in the context of proceedings of a different nature and in any case there are no grounds available to justify the far reaching effect that TZB now canvasses that Federal Court order has.

[52] We did not see how the Federal Court order of 5 March 2010 had any relevance to the issues at hand or how it 'rescinded' the High Court order of 9 May 2006 and/or the subsequent dismissal on 28 July 2008 by the Court of Appeal of the appeal brought by TZB against that High Court order. There was no application by TZB for leave to pursue with a further appeal to the Federal Court against the Court of Appeal decision of 28 July 2008. As repeatedly highlighted above, the proceedings at the High Court leading to Azahar J's orders of 9 May 2006 (affirmed subsequently by the Court of Appeal) specifically and conclusively dealt with the issues of 'lien' and 'collusion' as now raised by TZB in the separate Sessions Court proceedings, from which this appeal before us ensued.

Conclusion

[53] For the reasons discussed and elaborated above, we did not find any merits in the appeal of TZB against the concurrent decisions of the Sessions Court and the High Court. We are therefore unanimous that the appeal be dismissed with costs.

After further hearing counsel for appellant on 5 February 2015, we fixed RM5,000 as the costs payable to the respondent. Deposit was ordered to be paid to the respondent to account of costs ordered.